SUPREME COURT, U. S.

SEP 16 1967

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Supreme Court of the United States

OCTOBER TERM, 1967.

No. 169

BENJAMIN F. KITCHEN, JR.,
Petitioner,

versus

ELIZABETH FRANZHEIM REESE,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Louisiana.

BRIEF OF LILLIE WEIR FRANZHEIM McCULLAR, RESPONDENT.

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MAY IT PLEASE THE COURT:

SUPPLEMENTAL STATEMENT OF THE CASE.

A. Although a respondent and appellee in the Supreme Court of Louisiana, this opponent has never been served or made a party by petitioner, Benjamin F. Kitchen, Jr., and more than ninety days have expired since the judgment of the Supreme Court of Louisiana has become executory, and opponent al-

leges she has been prejudiced thereby as part of the property of Lillie Weir Simms resulting from her being a forced heir and legatee of her mother, Bessie Simms Franzheim, who was a daughter and forced heir and legatee of the latter's mother, Lillie Weir Simms, under the complained of decision of the Supreme Court of Louisiana was given to her through the Succession of Bessie Simms Franzheim and petitioner's petition for writ of certiorari should either be denied for this reason and for other reasons, or she should be made a party respondent herein and the petition of petitioner, Benjamin F. Kitchen, Jr., should be denied.

Only petitioner, Benjamin F. Kitchen, Jr., out of a number of defendants in the original proceedings, who litigated by appeal and also by application for certiorari to the Supreme Court of Louisiana the decision of the District Court which was adverse to them, has elected to petition this Court. Mrs. Simms attempted to establish two trusts by her will and also appointed executors in said will. None of the trustees of the two trusts which Mrs. Simms attempted to establish, none of the executors of Mrs. Simms' will, and none of the great-grandchildren of Mrs. Simms (with the exception of that filed by petitioner, Benjamin F. Kitchen, Jr., as tutor of his son, Benjamin F. Kitchen, III, a great-grandchild of Mrs. Simms) have filed with this Court a petition for writ of certiorari to the Supreme Court of Louisiana.

B. Both in the inter vivos trust to which Mrs. Simms made reference in her will and also in the will

itself there was language which established beyond the peradventure of a doubt that the testatrix, Lillie Weir Simms, definitely had in mind the law of the State of Louisiana rather than the law of the State of Texas. We quote from the will of Mrs. Simms dated January 3, 1957, as follows:

> (1) "My daughter, Mrs. Bessie Franzheim, under the laws of the State of Louisiana, is entitled to one-third of all the real estate and royalties owned by me in the said State of Louisiana, and it is my desire that she should receive this one-third." (Article XVII, will of Mrs. Simms as annexed to Petition for Probate at R. 12.)
>
> (2) Each of the inter vivos trusts referred to in the will and to which reference is made for the rights, powers and duties of the trustees and, in connection with the trusts for the great-grandchildren, for the purpose of identifying trustees and trust properties, provides in paragraph 17 thereof that ". . . this instrument shall be construed in all respects according to the laws of the State of Louisiana". (Exhibits A, B and C(1) through C(6) annexed to the stipulation of April 24, 1963, R. 192 et seq.)

C. The petition for certiorari states, at page 22, that ". . . nowhere in the will do either of the life tenants, the grandchildren, acting through Trustees or otherwise, have any right to sell, mortgage or commit waste of the principal properties from which the income was expected to be derived . . .". Each

of the inter vivos trust agreements above referred to provides in paragraph 6 thereof that the trustees have the power to lease the trust property beyond the period of the trust, may borrow money on the credit of the trust estate, may mortgage the trust properties and may pledge the trust assets."

D. The Louisiana Supreme Court's decree dated November 7, 1966, is clearly based upon the finding that Article XIX of her will, which forms the basis for this litigation, was null and void because it contains a *prohibited substitution.* The decree was further based upon the determination of the Supreme Court of Louisiana upon an additional independent non-federal ground that many of the conditions under which the grandchildren and great-grandchildren are to succeed to the interest bequeathed them in the will are contained in the inter vivos trusts established by Mrs. Simms in 1954 and which inter vivos trusts Mrs. Simms made a part of her will by reference only, although they were intended to affect and relate to the disposition mortis causa of her property. We quote the following excerpt from the final decision of the Supreme Court of Louisiana, starting at page 75, in Appendix C, annexed to the petition for writ of certiorari, as follows:

> "In the first place, it is apt to observe here that many of the conditions under which the grandchildren and great-grandchildren are to succeed to the interests bequeathed them in the will are contained in the inter vivos trusts established by Mrs. Simms in 1954, and which she

makes a part of her will by reference only, although they are intended to affect and relate to the disposition mortis causa of the property. Under the jurisprudence of this state *this invalidated the entire will.* Succession of Ledet, 170 La. 449, 128 So. 273 and Hessmer v. Edenborn, 196 La. 575, 100 So. 647. As stated in the latter case, with the late Justice Odom as the organ of the court: '. . . *where a testator refers to another writing for the purpose of manifesting the substance of his wish or desire, and where that wish cannot be ascertained without referring to such writing, then the testament . . . is invalid.*' (The emphasis has been supplied by respondent.)

"We are not unmindful of the fact that under the provisions of Articles 10, 491, and 1596 of the Revised Civil Code testaments are effective in this state where, as stated in the latter article, they are 'clothed with all the formalities prescribed for the validity of wills' where they were executed. But these articles have reference to matters of form that neither affect nor relate to the disposition of the property. In any event, and without resort to the documents which Mrs. Simms sought to incorporate in her will by reference alone, it is clear that Article XIX in itself contains a prohibited substitution pure and simple."

E. Under Item 2 of the captioned "Jurisdiction" petitioner refers to raising the federal question in the brief of petitioner in the Court of Appeals and also in

the opinion on rehearing of the Louisiana Supreme Court. The constitutional complaint of the petitioner, as reflected in the references to the Louisiana Supreme Court opinion, was based upon the action of that Court in declaring the trust provisions invalid by applying the law of Louisiana. This contention was found to have no merit by the Supreme Court of Louisiana. Petitioner in his brief in the Court of Appeal at page 17, under the caption IV, set forth his contention that "the court's determination that Louisiana law applied, instead of that of Texas, under which the will is valid, is inequitable and is tantamount to a denial of the federal guaranteed rights of equal protection, U. S. Const. amend. XIV, Sec. 1, privileges and immunities, U. S. Const. art. IV., Sec. 2."

In the petition for writ of certiorari filed with this Court and directed to the Supreme Court of Louisiana the petitioner assigned as an error, alternatively with respect to the decision of the Court of Appeal for the Fourth Circuit, State of Louisiana, that the application by the Supreme Court of Louisiana of the Louisiana law to this case by nullifying the will of Mrs. Simms abridged rights of petitioner which were guaranteed by the Constitution of the United States of America, complaining that that court's finding that the law of Louisiana applied instead of the law of Texas was inequitable and denied federal guaranteed rights. Petitioner took the same position in his original brief filed in the Supreme Court of Louisiana. *Petitioner did not urge the contention now made in this Court* to the effect that while the law of

Louisiana is applicable, resort to the common law or the law of Texas should be made or had for the purpose of ascertaining the intention of decedent in her will and that the failure to do so resulted in a denial to petitioner of his constitutional rights until petitioner filed his brief in the Supreme Court of Louisiana supporting his application for a rehearing of that court's decision.

STATEMENT OF OPPOSITION.

The application of the Texas law in this case is not involved, but the Louisiana law is controlling. The question involved is what validity and legal effect is to be given to the will of a person domiciled in Texas on the date of her death insofar as it relates to property located in Louisiana which is classified by Louisiana law as an immovable, which is the same as real property under the nomenclature of the law of common law states. Immovable property under the law of Louisiana is in the same category as land. It is an old established rule that the law of each state controls the descent and distribution of immovable or real property within its borders. In this case the Louisiana law governs the alienation, transfer and descent of the immovable property referred to in Article XIX of the will of the decedent. The effect and construction of wills and other conveyances are governed by the law of the state where the immovable or real property is located. *Olmsted vs. Olmsted,* 216 U.S. 386, 54 L.Ed. 530, 30 S.Ct. 292; *Hood vs. McGehee,* 237 U.S. 611, 59 L.Ed. 1144, 35 S.Ct. 718. Although

petitioner concedes that the Louisiana law should be applied, it is his contention that if the law of Louisiana is applied this will deny him constitutional rights which the Supreme Court of Louisiana decided lacked merit. Petitioner has sought to escape the application of the old established law, which we have cited above, by contending that the Supreme Court of Louisiana deprived him of vested constitutional rights by failing to apply the same standards in interpreting the will of decedent as it would have used if decedent were a resident of Louisiana and, second, that the Supreme Court of Louisiana, even though the matter involved immovable or real property in Louisiana, should have construed the will of decedent in accordance with the common law and not in accordance with the law of Louisiana. There is a clear lack of a substantial federal question in this matter. There was also a failure on the part of petitioner in raising the specific constitutional question which petitioner now presents except in petitioner's brief in support of an application for rehearing. The constitutional question passed upon is not that referred to in petitioner's statement as to jurisdiction on page 2 of petitioner's brief.

Petitioner, so far as we can find in his application for a writ of certiorari, has cited no authority to uphold petitioner's contention that the interpretation by the Supreme Court of the State involving the validity of a will, insofar as it affects immovable real property within that state, according to the laws of that state, provides a basis for the denial of

any federal right for the using of the discretion of this Court in granting writs of certiorari. Petitioner, likewise, has not cited any decision which shows that the Supreme Court of Louisiana has made any distinction between the interpretation of wills of residents of Louisiana and non-residents of Louisiana. Petitioner has not cited any authority which shows that the Supreme Court of Louisiana has discriminated in any manner in deciding the validity of a non-resident's will. All that petitioner seems to be trying to do is to substitute the law of the State of Texas for the law of the State of Louisiana so that he can persuade this Court to grant a writ of certiorari.

From *Olmsted vs. Olmsted, supra,* 216 U.S. at p. 395, 54 L.Ed. at p. 533, and 30 S.Ct. at p. 295, we quote the following:

> "We are not concerned with the correctness of the decision of the court of appeals of New York, interpreting its statutes and applying the law of its jurisdiction to the construction of the will of Silas Olmsted. We hold that there is nothing in the Federal Constitution requiring the courts of the state of New York to give force and effect to the statute of the state of Michigan, so as to control the devolution of title to lands in New York."

Petitioner contends that the decedent's intention should be determined by construing the language of the will according to the law of Texas. This would be an exception to the rule rather than the rule which we should apply here. The decedent clearly had in

mind the law of the State of Louisiana if we refer to the will. In Paragraph XVII the decedent refers to the laws of Louisiana as follows:

> "My daughter, Mrs. Bessie Franzheim, under the laws of the State of Louisiana, is entitled to one-third of all the real estate and royalties owned by me in the said State of Louisiana, and it is my desire that she should receive this one-third."

Since Mrs. Bessie Franzheim was the only child of Mrs. Simms, she was entitled as forced heir to receive under the Louisiana law a legitime of one-third and Mrs. Simms shows in said provision of the will that she clearly had the law of Louisiana in mind in regard to her real estate and royalties owned by her in the State of Louisiana. The decedent in setting up inter vivos trusts prior to her death clearly did away with the presumption that as a domiciliary of Texas she intended the will to be construed under its law not only by reference to the aforesaid provision of her will but also by references in the will to the inter vivos trusts which she had set up prior to her death. She refers to these inter vivos trusts in Paragraph XIX of her will in subparagraph (a) where she refers to the trust agreement made in the inter vivos trusts. In this inter vivos trust agreement which is referred to in the will it is provided that the trusts attempted to be created by the will are "to be held and administered by them, the income of which shall be invested or distributed at the sole discretion of said Trustees and shall be held by said Trustees and their suc-

cessors with the same rights, powers and duties as are set forth in the above named trust agreement."

It is provided in the inter vivos trust ". . . this instrument shall be construed in all respects according to the laws of the State of Louisiana." (Exhibits A, B and C(1) through C(6) annexed to the stipulation of April 24, 1963, R. 192 et seq.)

A reading of the petition of petitioner shows that he conceded that the effect of the bequest must be determined by the law of Louisiana. It is this legal effect of the language which the Supreme Court of Louisiana has determined invalidated the will, that is, the language of the will did not, according to the law of Louisiana, leave a usufruct of property to one and the naked ownership to another, which is the test used by the Supreme Court under the Louisiana law to determine the validity of the will.

Petitioner tries to allege discrimination in the manner used by the Supreme Court of Louisiana in determining whether or not there was a prohibited substitution and petitioner refers at page 14 of his petition to *Succession of Fertel*, 208 La. 614, 23 So.2d 234 (1945). In that case petitioner states that the husband's usufruct and his son's legitime were recognized under the terms of a will which ". . .left the property to the husband, after death to the son." In a Per Curiam, 23 So.2d at p, 245, we find a statement of the manner in which the Louisiana courts determine whether provisions of a will violate Article 1520 of the Louisiana Civil Code or are permitted by Article

1522 of the Louisiana Civil Code. This excerpt from said case shows clearly that the disputed will did not leave the property to the husband of the decedent and after his death to the son. In the *Fertel* case decedent left "the use of" the property to her husband while in the *Simms* case decedent left title to the property to the trustees and after the termination of the trust bequeathed the property to great-grandchildren who were not beneficiaries of the trust. From the *Succession of Fertel* case we quote, at p. 245:

> "Barney Fertel is the only party who has applied for a rehearing. His contention is that the will is null in that it violates article 1520 of the Civil Code. The article provides that a testamentary disposition by which the legatee is charged with the duty to preserve the legacy for a third person, to whom the title is to pass at the death of the legatee is a prohibited substitution. According to article 1522 a bequest of the usufruct of property to one person and of the naked ownership to another is not a prohibited substitution and is therefore a valid disposition of both the usufruct and the ownership of the property. In deciding, in any given case, whether a legacy of this kind is violative of article 1520 of the Code, the only question is whether the intention of the testator as expressed in his will was to give the usufruct of the property to one person and the ownership to another, as permitted by article 1522 of the Civil Code. Each case is governed by the wording of the testament. The deci-

> sions on the subject are reviewed extensively, and compared in the Succession of Ledbetter, 147 La. 771, 85 So. 908. There is no necessity for reviewing or comparing the decisions again in this case, Here, the testatrix did not declare that she left her property to her husband, but declared that she left 'the use of it' to her husband, and that at his death it should go to her two daughters and her grandson. By the term 'the use of it' the testatrix must have meant the usufruct of the property, not the ownership of it."

It can clearly be seen that the decedent in the *Succession of Fertel* left to her husband the use of the property while in the *Simms* case the bequest to the trustees was not the use of the property, but the property.

Another case which involved the will of a Louisiana decedent was the *Succession of Ledbetter*, 147 La. 771, 85 So. 908, where the Supreme Court of Louisiana declared the will of a Louisiana decedent invalid because it violated Article 1520 of the Louisiana Civil Code and which is a clear example of the application of the same rule to the will of a Louisiana decedent as in the present case of a Texas resident decedent.

We quote from the *Succession of Ledbetter*, at p. 773 referring to the will as follows:

> " 'Second. After complying with the above provisions, I wish my son, Dr. Wiltz M. Ledbetter,

to have the half of remaining part of my estate or the half of the revenues therefrom during his lifetime. But should he die without an heir or child I wish his part of my estate to be paid or go to my present grandchildren, viz.: Wiltz M. Ledbetter, William V. Ledbetter and Joanna Ledbetter (children of Dr. Marion Ledbetter) and equally with these any other grandchildren that may yet be born.' "

We again quote from the *Succession of Ledbetter*, at p. 779 where the Louisiana Supreme Court said:

" 'The bequest in this case is as plain a substitution as can be conceived. According to article 1520 of the Code, it is absolutely null. To declare it valid, under the doctrine that the giving of property to one person during his life and at his death to another is the giving of a life usufruct to one and the naked ownership of the property to the other legatee would be an absolute violation of article 1520 of the Code.

" 'Being therefore compelled now to elect whether to correct or perpetuate the error of the doctrine announced in Rice v. Key and repeated in the Succession of McDuffie, we now correct the error, and overrule those decisions in so far as they hold that the giving of property to one person during his life and at his death to another is the giving of the usufruct to one and the naked ownership of the property to the other legatee.' "

The test of whether a substitution prohibited by our law is contained in a will is that it vests the property in one person at the death of the testator and upon the death of that person, in whom it was vested at the death of the testator, the same property is vested in another person who takes the property directly from the testator but by a title which only springs into existence on the death of the first donee. By making this disposition in the will the testator destroys the power of the first donee to alienate the property, because the first donee is bound to hold the property until his death so that the person then called to the title upon the death of the first donee may take same. The second donee during the life of the first donee has no power of alienation because his title does not spring into existence until the death of the first donee. This is a substitution and is reprobated under the law of the State of Louisiana.

Petitioner has referred to certain decisions of the Louisiana Supreme Court (see Appendix C, page 68, of the petition herein). With the exception of the *Guillory* and *Meadors* cases, the Louisiana Supreme Court discussed substitutions involved in wills of Louisiana residents. It therefore clearly appears that not only did petitioner not become vested with any property interest under Louisiana law but that he was not discriminated against by the Louisiana Supreme Court in its application of the Louisiana law. We quoted from the decision of the Louisiana Supreme Court, at page 4 *supra*, which is sought here to be reviewed, and which quotation shows that it was

based on a substantial and sufficient non-federal ground. If it appears that the decision in a state court judgment rests on an independent, non-federal ground, which is adequately supported, this Court has established a principle of not reviewing that state court judgment. See Comment and Authorities, Sec. 158, page 337 et seq. of West's Federal Forms, Vol. 1.

SUMMARY AND CONCLUSION.

It therefore is quite clear that the petition does not have any basis upon which this Court should grant a writ of certiorari. This case involves the validity of a will relating to immovable or real property within the State of Louisiana. The law of Louisiana and the interpretation thereof by the Louisiana Supreme Court is therefore controlling. Petitioner has conceded that the effect is to be determined by the law of Louisiana, and petitioner's suggestion that the Texas law should be applied in interpreting the will in this case cannot be applied to the circumstances of this case. Here Mrs. Simms, the decedent, contemplated the application of the law of Louisiana both in her will and in the reference thereto in the inter vivos trusts. The legal effect of what Mrs. Simms has done must be determined by the law of Louisiana where the immovable and real property is located. This case lacks any substantial federal question, and petitioner has not heretofore raised the specific constitutional issues which petitioner now urges. Further, the Louisiana Supreme Court decided that decedent's will could not under the law of Louisiana incorporate ex-

trinsic, non-testamentary trust instruments, and that this likewise invalidated the will. This alone provides a substantial and sufficient non-federal ground as to which no issue has been taken by the petitioner.

For all of the above and foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

.....
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PROOF OF SERVICE.

I, John L. Toler, attorney for respondent, Lillie Weir Franzheim McCullar, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this day I served copies of the foregoing Brief of Respondent on Petition for Writ of Certiorari on:

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Counsel for Elizabeth Franzheim Reese, Respondent,

by mailing a copy thereof, postage prepaid, addressed to their offices as above shown and at the addresses above shown.

New Orleans, Louisiana, this .... day of September, 1967.

.....
JOHN L. TOLER.